No. 9892

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

REPLY TO PETITION FOR REHEARING

JOHN FRANCIS CONNOR,
DOUGHERTY & CHANDLER,
516-19 Heard Bldg.,
Phoenix, Arizona,
Attorneys for Appellee.

TOPICAL INDEX

TABLE OF AUTHORITIES

TEXTS

No. 9892

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

REPLY TO PETITION FOR REHEARING

Comes now, Lois Rogers, Appellee in the above entitled Cause and in resistance to Appellant's Petition for Rehearing, replies to the respective numbered grounds set out by Petitioner, as follows:

I.

Whether policy was in possession of insured at time of telephone conversation, between witness Clem and Lindberg, General Agent, re credit, is not solely determinative of extension of credit.

Appellant contends that the jury's findings that there was an extension of credit was justified by the

Court, apparently on the assumption that at the time of the telephone conversation in question, "Rogers was in possession of the policy."

The testimony of Mr. Clem is that this conversation was held during "the latter part of December" (T. 178). Appellant asserts that Lindberg's remarks concerning payment of premium is consistent with the assumption that the policy was not in Rogers' possession at that time. Lindberg's remarks are equally as consistent with the converse assumption. With respect to the policy *not* being in possession of the insured, at the time in question, there is a total lack of evidence.

A reading of the Opinion discloses that the observation of the Court, to-wit: "At that time Rogers was in possession of the policy" had no necessary essential relation to the reasoning of the Court, that the jury could have found that Mr. Lindberg intended to issue the policy on credit. The Court indicated that the jury might so find because of the evidence showing the telephone conversation of Mr. Lindberg to have been directly connected with the theory that credit was extended. The words of the Court, to which Appellant attaches such significance need not necessarily have been written within the paragraph in question at all. The possession of the policy at the time of the telephone conversation is not conclusive. Rather the delivery and possession of the policy at some time during the life of the insured, in pursuance of the agreement to extend credit, is the essential factor, and there was ample evidence on that point for the jury to consider.

Other factors such as the conversations and actions of Mr. Lindberg with Mrs. Rogers, as substantiated by her son Gale Rogers, were matters which lent credence

to the theory of extension of credit. So also was the evidence with respect to the common practice of the Company with regard to similar policies a factor, as well as a variety of other circumstances which were in evidence before the jury.

Even if the policy had not been in Rogers' possession at the time of the telephone conversation, that fact does not necessarily indicate that an agreement for the extension of credit or waiver of the cash premium had not been made. It is equally as plausible that at the time of the conversation, the agreement to extend credit had previously been made, - - the delivery of the policy, subsequent to such conversation, if indeed, the delivery was made later, would only be confirmatory of such extension agreement, and the delivery of the policy in pursuance thereof would have made such agreement binding, or an agreement fully executed.

This matter was fully argued and considered by the Court in the former hearing, and the point made by Appellant in its Petition for Rehearing is immaterial and could not affect the result. The expression of the Court, concerning the policy being in the possession of Mr. Rogers "at that time," is not a connecting premise qualifying or supporting the reasoning that because of the gist of the telephone conversation, the jury was justified in finding an intent to extend credit.

> "A rehearing will not be granted by the * * * Court because of an inadvertent form of expression in its opinion which could have had no possible influence upon the reasoning stated therein which rendered it necessary

to affirm the judgment below."

Bradford v. U. S.
33 S. Ct. 1026,
57 L. Ed. 1630.

II.

It was not error to submit to the jury the question of General Agent's actual or ostensible authority to extend credit.

Under this contention, Appellant asserts that the Appellate Court fell into error through recognizing general legal principles not applicable to the circumstances involved here.

We fail to see where the Court "has fallen into error."

It is unnecessary to again argue the facts concerning Mr. Lindberg's apparent or ostensible authority to have made the credit arrangement. The evidence with all its implications and inferences was for the jury to determine. The facts indisputably established that the Company issues and delivers the policies on a credit basis, and that said deliveries were made without the payment of the initial premium in cash, and also such routine practice was the regular practice of the Company. (T. 142-144, 156).

We can see little point in the distinction and implications by Petitioner, that it was soliciting agents who followed such practice. Certainly if soliciting agents pursued such a customary course of conduct, it may well be considered as conclusive that the General Agent had ostensible or apparent authority to extend credit, or waive policy provisions, and the formula which he chose to ad-

opt or the technique by which the arrangements were effected, would be immaterial.

It is also intimated that the "uncontroverted" facts show that when an Agent applied for insurance on his own life, Appellant's Branch Office employees were not permitted to deliver the policy to him until pre-payment of the first premium. The reference is to the transcript at p. 123. This is the testimony of Mr. Caskey, Cashier of the Company and an interested witness.

Pages, 211 and 212 of the transcript on recross-examination of Mr.. Lindberg, the General Agent, shows that the Appellant was unable to find any substantiating evidence in support of Mr. Caskey's statement. We quote from the record, (T. 212), as follows:

> **"Q. You extend credit to the agent, that is right isn't it?**
>
> **A. Yes, where the applicant is some one other than an Agent of the Company.**
>
> **Q. Well it does not say anything about that in here, does it?**
>
> **A. I don't know.**
>
> **Q. I will ask you to examine it and see if you can find anything (handing document to witness)?**
>
> **A. I am quite sure there is nothing in here that says anything about that."**

If it were the practice of the Company to refuse credit to the Agent on his own life there was no evidence that such a peculiarly restrictive rule was brought to the attention of Rogers.

Moreover, the testimony of Mr. Lindberg (T. 212),

controverts the testimony of the Company's own Cashier at p. 123 of the transcript.

We take it to be the law that testimony offered by the Company's witness, even if in part, not specifically contradicted by testimony of adverse witnesses, doesn't imply that the jury must accept such statements as sacronsanct.

The Court or jury is not required to believe or accept as true testimony of witnesses although not contradicted by direct evidence. *Crozier v. Noreiga,* 27 Ariz. 409 @ p. 416, 233 P. 1104; *Ill. Bankers' Life Ass'n. v. Theodore,* (Ariz.) 34 P. (2d) 423 @ 428; *Brooks v. Neer,* (Ariz.) 47 P. (2d) 452 @ 456, Col. 1;

The jury might well consider the bias or interest of witnesses as well as the fact that the testimony, although uncontroverted, may be inconsistent and not entitled to credit, or that it is improbable or that the manner of testifying on the part of the witness casts a doubt upon the truth of his or her statements - - all the surrounding circumstances of the particular transaction in question may refute and directly or impliedly contradict the evidence.

III.

The failure to sign the aviation rider, in the manner desired, in the absence of notice, would not preclude policy from beooming effective.

This Court found, under the facts of the instant case, that it was not necessary for Rogers to have signed the aviation rider. That conclusion was based upon the finding that "there is no evidence that such requirement was brought to the attention of the insured." (Opin. p. 5).

Appellant objects to this conclusion and attempts to make a specious distinction, in that while no *specific* testimony was offered that Rogers was instructed to sign the rider, yet the inferences to be drawn from Mr. Caskey's testimony set out at p. 5 of Petition for Rehearing, (T. 109), and (P. 6, of Petition; - - T. 120), permitted the presumption that Rogers was informed of such requirement by virtue of an "invoice form" (P. 7, Petition).

With reference to this testimony of Mr. Caskey's (T. 109), it may be observed that he was referring not to the particular application of Rogers, as a distinct individual but rather he was alluding to a suppositious or fictitious applicant.

With regard to the testimony offered (T. 120), again, we desire to point out that this testimony relates in part, to what was done with reference to Mr. Rogers' policy, and in part, it is a recital of what is *generally* done, but it is not in any manner indicative of the fact that this so-called "invoice form" was ever sent to Rogers.

Appellant testified, (T. 123), in effect that when a policy is issued on an Agent's own life, the Company holds the policy and tells him upon payment of the premium the policy will be sent to him. Now if this were the true practice of the Company, then there would have been no reason to have sent this so-called "invoice form" to Rogers at all. The mailing of such forms, if ever dispatched, has reference to those cases, where a soliciting agent is given certain instructions prior to the delivery of the policy to an insured who constitutes one of the general public.

Mr. Caskey testified at the opening of the case that the policy as handed to him when on the stand as a witness, was in the same form and condition as when it was originally mailed to Mr. Rogers. He stated:

"It appears all to be there." (T. 80).

It will be remembered that the policy in question was taken from Mr. Rogers' effects after his death by the General Agent. The jury might also have thought that if either the so-called "invoice form" or "rider" was ever sent to Mr. Rogers for signature, then one or the other of the instrumens would have been found with the policy. Neither the "invoice form" or the "rider" ever appeared in evidence. Further at pp. 110 and 111 of the transcript, referring to the instructions sent by the Home Office to the Branch Office, the question was asked of Mr. Caskey as to whether or not he had ever shown such instructions or letter to Mr. Rogers. Mr. Caskey answered:

"No, I never saw Mr. Rogers"
and:
"No, he would never see that letter."

Now, it certainly is not sufficient for the granting of a rehearing that the Appellant offer merely the "presumption" that an "invoice form," which was not shown to have been actually sent to Mr. Rogers, would be tantamount to putting the insured on notice as to the necessity of signing a certain rider or amendment.

Furthermore the whole impression sought to be created by Appellant in its case in the Lower Court was to the effect that in instances where policies were issued on the Agent's own life, that *special procedure* was there followed; therefore, the testimony of Mr. Caskey as to general routine practice in ordinary cases, cannot

be inferred to have any applicability to the Rogers case.

It thus follows that the predicate upon which the Court founded its conclusion, namely: "there is no evidence that such requirement was brought to the attention of the insured," is abundantly sustained by the record.

As a consequence, it may be perceived that the Court's further conclusion that Rogers had the right to adopt and did adopt the typewritten signature on the aviation rider as his own, was a necessary logical deduction, which was eminently correct.

IV.

Instruction No. IV. was not prejudicial to Appellant.

Appellant asserts that the Lower Court's instruction No. IV being erroneous, was also prejudicial in that it, in effect, took from the jury the issue with respect to whether or not Rogers knew of and had complied with provisions requiring his signature on the rider.

The answer to such contention is that there was no evidence offered by Appellant on the point, inferences and presumptions from the so-called "invoice form" to the contrary notwithstanding. If no evidence on the issue were offered, obviously, there would be nothing, which, in effect, could be withdrawn from the jury's consideration. The whole purport and tenor of Appellant's testimony was that the Home Office had forwarded the policy to the Branch Office for delivery, contingent on certain conditions. (T. 109-125). The Appellant offered no evidence whatsoever that knowledge of any of these conditions, was brought to the attention of the insured.

The only possible testimony touching upon the point of knowledge to Rogers, was adduced by the plaintiff, as negative evidence on cross-examination establishing that no memoranda or other indicia of knowledge were ever sent to Rogers, or found with the policy. It may be contended that the instruction complained of, might have embraced the factor that the jury should find, one way or the other, with respect to notice, yet we respectfully suggest that inasmuch as there was no evidence-in-chief offered on the point, the instruction, under the law of the case, was not prejudicial.

No prejudice can be predicated upon an error which relates to a part of the case which is found or determined against the objecting parties.

> "Error in instructing or failure to instruct as to the law applicable to a defense raised is without prejudice where the finding of the jury for the plaintiff must, under the instructions given them, be taken as negativing the existence of the facts upon which such defense was based."
>
> *Adamson v. McKeon*
> 225 N. W. 414,
> 65 A. L. R. 817

Even assuming that the instruction had been qualified in such manner as to point out to the jury that it should find whether or no Rogers had such knowledge, can it be said under all the evidence that the jury's verdict would have been different? Obviously not, where there was no evidence on the part of the Appellant that Rogers was so notified, and of course, it follows that not having been notified of the necessity to sign such rider, he could not be bound thereby.

A party should not be heard to complain of the

failure or omission of an instruction, where, under the proved facts, the verdict would necessarily have been the same if the instruction had been given. *Warfield Nat. Gas Co. v. Clark*, 79 S. W. 2nd 21, 97 A. L. R. 971.

It is hardly necessary to reiterate that the judgment should not be disturbed because the particular instruction does not contain all the conditions and limitations which might be therein embraced. Instructions are to be read and considered as a whole, and the fact that when taken separately, some of them may fail to enunciate in precise terms and with legal accuracy propositions of law, does not necessarily render them erroneous or prejudicial. It is sufficient if all the instructions taken together give the jury a fair and understandable notion of the law regarding the point discussed. *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547, 54 L. Ed. 877; *People v. Doylle*, 48 Calif. 85; *Holoway v Dunham*, 170 U. S. 615, 42 L. Ed. 1165; *Gamache v. Piquignot*, 16 How. 451, 14 L. Ed. 1012; *Stephenson v. So. Pac. Co.*, 102 Calif. 143, 34 Pac. 618.

There is nothing in Appellant's objection to the instruction which would indicate that a new trial would result in a different verdict based upon the same evidence.

The defendant is not prejudiced by the Court's failure to instruct as to the law where there is an absence of evidence on the points raised. *Goupiel v. Grand Tr. R. R. Co.*, 96 Vt. 191, 118 A. 586, 30 A. L. R. 690; *Donehy v. Com.*, 170 Ky. 474, 186 S. W. 161, 3 A. L. R. 1161.

No judgment should be reversed by reason of any error, instruction or defect, unless it appears that the error complained of was prejudicial to the substantial

rights of the Appellant. Error going only to immaterial, minor, or technical questions is not ground for reversal, especially where it does not touch the controlling questions of the case. *Dayton Power & L. Co. v. P. U. Comm.*, 219 U. S. 290, 78 L. Ed. 1267; *So. Pac. Co. v. Schoer*, 114 Fed. 466, 57 L. R. A. 707; *Ross v. Kay Copper Co.*, 20 Ariz. 576, 184 Pac. 978; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003; *N. Y. C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531.

Where there is substantial conflict in the evidence on the whole case, the Appellate Court will not disturb the decision of the Lower Court. *Hayne, New Trial and Appeal*, Vol. 2, Sec. 288, p. 1614.

In the instant case, there was substantial conflict on all the material facts presented for determination, and the general verdict having been rendered in favor of the plaintiff, it follows that the jury found against the defendant on all the issues involved.

WHEREFORE, it is respectfully urged that no sufficient grounds appear for the granting of a rehearing in this case, and the Petition of Appellant should be denied.

Respectfully submitted,

JOHN FRANCIS CONNOR,

DOUGHERTY & CHANDLER,

BY .....

Attorneys for Appellee.